STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Talbot, C.J., and Wilder and Fort Hood, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DANIEL HORACEK

Defendant-Appellant
_____/

Supreme Court No. 152567

Court of Appeals No. 317527

Lower Court No. 2012-241894-FH

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

BY: CHRISTOPHER M. SMITH (P70189)
Plea Unit Leader
State Appellate Defender Office
200 N. Washington Sq., Suite 250
Lansing, MI 48913
(517) 334-6069

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF JURISDICTION ii

STATEMENT OF THE QUESTION ADDRESSED BY AMICUS CURIAE iii

STATEMENT OF INTEREST OF AMICUS CURIAE iii

STATEMENT OF FACTS 1

ARGUMENT 2

I. ***Reid*** **did not create an appellate harmless-error test for conditional guilty pleas. It instead established a prerequisite for a trial court's acceptance of a conditional plea in the first place—one that no longer exists under today's court rules** 3

II. **Like the overwhelming majority of jurisdictions, this Court should refuse the prosecutor's invitation to create an appellate harmless-error test for conditional guilty pleas** 6

III. **When a reviewing court concludes that a conditional plea should not have been accepted, then that plea is void at its inception and must be vacated. The defendant must then have the option of either entering an unqualified plea or proceeding to trial** 8

SUMMARY AND REQUEST FOR RELIEF 12

TABLE OF AUTHORITIES

CASES

Brady v United States, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747 (1970) 9
Chapman v California, 386 US 18; 87 SCt 824; 17 LEd2d 705 (1967) 6
Commonwealth v Thomas, 351 Pa Super 423; 506 A2d 420 (Pa Super, 1986) 11
Glenn v Commonwealth, 48 Va App 556; 633 SE2d 205 (Va App, 2006) 2, 6, 8
Hill v Lockhart, 474 US 52; 106 S Ct 366; 88 L Ed 2d 203 (1985) 8
Hooten v State, 212 Ga App 770; 442 SE2d 836 (Ga App 1994) 11
Jones v Wisconsin, 562 F2d 440 (CA 7, 1977) 6
Lee v United States, __ US __; __ S Ct __; __ L Ed 2d __ (June 23, 2017)(Docket No. 16-327) 7
Lineberry v State, 747 NE2d 1151 (Ind Ct App, 2001) 11
Neuhaus v People, 289 P3d 19 (Colo, 2012) 11
People v Cunningham, 286 Ill App 3d 346; 676 NE2d 998; 222 Ill Dec 34 (Ill App, 1997) 11
People v Grant, 408 NYS2d 429; 380 NE2d 257 (NY, 1978) 6, 7
People v Hill, 12 Cal 3d 731; 117 Cal Rptr 393; 528 P2d 1 (1974) 6, 7, 8
People v McFadden, 433 Mich 868; 445 NW2d 440 (1989) 9, 10
People v Miller, 33 Cal 3d 545; 189 Cal Rptr 519; 658 P2d 1320 (Cal, 1983) 8
People v New, 427 Mich 482; 398 NW2d 358 (1986) 5
People v Reid, 420 Mich 326; 362 NW2d 655 (1984) ..... passim
State v Arnsberg, 27 Ariz App 205; 553 P2d 238 (Ariz App, 1976) 11
State v Dorr, 184 NW2d 673 (Iowa, 1971) 11
State v Juarez, 120 NM 499; 903 P2d 241 (NM App, 1995) 8
State v Monahan, 76 Wis2d 387; 251 NW2d 421 (Wis, 1977) 6
State v Parkhurst, 121 NH 821; 435 A2d 522 (NH, 1981) 11
State v Peppers, 346 SC 502; 552 SE2d 288 (SC, 2001) 11
State v Piorkowski, 236 Conn 388 n15; 672 A2d 921 (Conn, 1996) 8, 9
State v Soares, 633 A2d 1356 (RI, 1993) 11
State v Truesdale, 278 SC 368; 296 SE2d 528 (1982) 11
United States v Benard, 680 F3d 1206 (CA 10, 2012) 2, 6
United States v Bundy, 392 F3d 641 (CA 4, 2004) 10, 11
United States v Weber, 668 F2d 552 (CA 1, 1981) 6
United States v Wong Ching Hing, 867 F2d 754 (CA 2, 1989) 11

COURT RULES

Fed R Crim P 11(a)(2) 6
MCR 6.301(C)(2) 5
MCR 6.302(C)(2) 8
MCR 7.214(C)(1) 9

SECONDARY SOURCES

Note, *Conditional Guilty Pleas*, 93 Harv L Rev 564 (1980) 4

STATEMENT OF JURISDICTION

Amicus accepts that this Honorable Court has jurisdiction over this matter.

STATEMENT OF THE QUESTION ADDRESSED BY AMICUS CURIAE

I. Is Mr. Horacek entitled to withdraw his conditional guilty plea if this Court finds a constitutional violation or if it declines to reach the merits of his Fourth Amendment claim?

Amicus answers, "Yes".

STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2. Under MCR 7.312(H)(2), CDAM may submit an amicus brief without moving for permission to do so.

STATEMENT OF FACTS

Amicus relies on the statement of facts provided by Defendant-Appellant Daniel Horacek.

ARGUMENT

CDAM urges this Court to reverse the judgment below and remand this case to the trial court to allow Mr. Horacek to affirm or withdraw his conditional guilty plea. We concur in the persuasive Fourth Amendment analysis proffered by Mr. Horacek's counsel. We file this brief to elaborate on why Mr. Horacek is entitled to plea withdrawal if this Court either: (1) finds a constitutional violation, or (2) declines to reach the merits of his suppression claim.

A defendant who prevails on appeal with respect to an issue preserved via conditional plea has an unqualified right to plea withdrawal. MCR 6.301(C)(2). Contrary to what the prosecution argues, this Court did not adopt an appellate harmless-error test when it decided *People v Reid*, 420 Mich 326, 337; 362 NW2d 655 (1984). Rather, the *Reid* Court established a prerequisite for a trial court's acceptance of a conditional plea in the first place—namely, a showing that the defendant could not be prosecuted if he or she succeeded on appeal. *Id.* at 331-332, 337. This requirement—no longer in place under our current court rules—had to be fulfilled for the plea to be valid and enforceable. Otherwise, the plea would be vacated. See Part I, *infra*.

This Court should decline the prosecution's invitation to adopt an appellate harmless-error test today. "[O]f the jurisdictions that have adopted some form of a conditional plea procedure, the overwhelming majority has declined to apply a harmless error analysis in cases involving a conditional guilty plea." *Glenn v Commonwealth*, 48 Va App 556, 582; 633 SE2d 205 (Va App, 2006) (collecting cases), vacated en banc on other grounds 49 Va App 413; 642 SE2d 282 (Va App, 2007). These jurisdictions have correctly concluded that such cases simply are not amenable to harmless error analysis. See, e.g., *United States v Benard*, 680 F3d 1206, 1213-1215 (CA 10, 2012) (collecting cases). The question is not whether the prosecution can still make its case despite the defendant's successful appeal. The question is instead whether the defendant wishes to affirm or withdraw his or her guilty plea in light of this success. See Part II, *infra*.

I. *Reid* did not create an appellate harmless-error test for conditional guilty pleas. It instead established a prerequisite for a trial court's acceptance of a conditional plea in the first place—one that no longer exists under today's court rules.

The prosecution urges this Court to hold that when a defendant prevails on an issue preserved by conditional plea, plea withdrawal will be permitted only if the issue is "dispositive to the outcome of the case." (Pros. Supp. Br. 5). It concedes that the plain language of MCR 6.301(C)(2) lends no support for such a rule. (Pros. Supp. Br. 5). But the prosecution maintains that "under the ruling in *People v Reid*, Defendant is unable to demonstrate that he is entitled to relief." (Pros. Supp. Br. 5).

Reid, however, did not create an appellate harmless error test. In that case, this Court addressed, as an issue of first impression, whether conditional plea bargains would be valid and enforceable in Michigan courts. *Reid*, 420 Mich at 329. The defendants in that case faced several charges stemming from the abduction, robbery, and sexual assault of four teenagers. *Id.* They jointly moved to suppress evidence on Fourth Amendment grounds. *Id.* at 330. When the trial court denied that motion, the defendants each pled guilty while also reserving the right to appeal the suppression ruling. *Id.*

After sentencing, the defendants pursued separate appeals. *Id.* In one defendant's appeal, the Court of Appeals approved of the conditional plea procedure and affirmed the denial of the suppression motion. *Id.* But in another's, a different panel held the conditional guilty plea to be invalid and unenforceable. *Reid*, 420 Mich at 330. It therefore set that defendant's plea aside and remanded for the taking of an unqualified plea or for trial. *Id.* at 331.

This Court granted leave to appeal in both[1] cases to resolve the conflict. This time, the defendants asked this Court to find their conditional pleas invalid. *Id.* at 331. This would mean that

[1] Although a third defendant also entered a conditional plea as a result of his involvement in the crime, this Court did not grant leave to consider his appeal. *Reid*, 420 Mich at 330, n 4.

"they pled guilty without an adequate understanding of the value of commitments made to them in exchange for their pleas[,]" thus necessitating plea withdrawal. *Id.* The *Reid* Court did not question the latter premise, but upheld the defendants' conditional pleas as valid and enforceable. *Id.* at 331.

In so holding, this Court rejected four policy arguments raised by the dissenting justices. Compare *Reid*, 420 Mich at 334-335 with *id.* at 346 (Ryan, J., dissenting). Most relevant to the instant case is the dissent's fourth point: that a conditional plea "forces decision on constitutional questions that otherwise can be avoided by invoking the harmless error doctrine." *Id.* at 346 (Ryan, J., dissenting). "[B]ecause no trial took place, an appellate court is unable to ascertain whether there is sufficient evidence that is not subject to suppression to warrant reversal." *Id.* After identifying this potential problem, the dissent conceded that steps could be taken to eliminate it:

> In response to that, it is proposed that all sides could agree that if the disputed evidence is suppressed, on appeal, the case must be dismissed. Or, in other cases where the magnitude of the error is unclear, a remand solves the problem and the prosecutor will decide, on remand, if there is enough remaining evidence to justify pursuing the case. [*Id.* at 347-348, citing Note, *Conditional Guilty Pleas*, 93 Harv L Rev 564, 576, n 54 (1980)].

The *Reid* majority took the dissent's concern to heart, but not by creating an appellate harmless-error test. Instead, it required both parties and the trial judge to do the work of determining which issues were worthy of appellate review. Fourth Amendment claims could be preserved for appeal via conditional plea only if "the defendant could not be prosecuted if his claim that a constitutional right against unreasonable search and seizure was violated is sustained and the defendant, the prosecutor, and the judge have agreed to the conditional plea." *Id.* at 331-332. Since the defendants' cases satisfied that criteria, this Court addressed the merits of their suppression claim. *Reid*, 420 Mich at 335-336.

This Court reaffirmed *Reid* two years later in *People v New*, 427 Mich 482, 490-491; 398 NW2d 358 (1986). *New* held that an unconditional guilty plea waives all non-jurisdictional defects—

including erroneous refusals to suppress evidence seized in violation of the Fourth Amendment. *Id.* at 494. But it noted that such a waiver could be avoided by the entry of a conditional guilty plea under the procedure established in *Reid*. *Id.* at 491.

New did not construe *Reid* as creating an appellate harmless-error test for conditional pleas. Put differently, the *Reid* "prosecutability" requirement was not a test for determining whether a defendant who prevailed on appeal could withdraw his or her conditional plea. Rather, as the *New* Court framed it, the *Reid* procedure determined whether the defendant could pursue that appeal in the first place:

> We held that a defendant may appeal from a denial of a . . . search and seizure claim where "the defendant could not be prosecuted if his claim that a constitutional right against unreasonable search and seizure was violated is sustained and the defendant, the prosecutor, and the judge have agreed to the conditional plea." [*Id.* at 490-491, quoting *Reid*, 427 Mich at 331-332].

Three years after *New*, this Court adopted MCR 6.301(C)(2). This new rule codified *Reid* in part, but eliminated the 'prosecutability' prerequisite. As Mr. Horacek persuasively argues, the plain language and history of this rule indicate that this Court intended to broaden, not narrow, the types of pre-trial issues which could be preserved by conditional plea. (Deft. Supp. Br. 14-18). The promulgators of the rule may have found the 'prosecutability' requirement superfluous in light of the veto power given to the parties and to the trial judge. At any rate, as the prosecution concedes, nothing in the text of MCR 6.301(C)(2) creates an appellate harmless-error test for conditional pleas. (Pros. Supp. Br. 5).

II. Like the overwhelming majority of jurisdictions, this Court should refuse the prosecutor's invitation to create an appellate harmless-error test for conditional guilty pleas.

The prosecution incorrectly asserts that "the majority of jurisdictions," along with the federal courts, hold that "if the contested issue is not dispositive of the case, relief by plea withdrawal is not

warranted." (Pros. Supp. Br. 13). In fact, the opposite is true. As one court has noted, "of the jurisdictions that have adopted some form of a conditional plea procedure, ***the overwhelming majority*** has declined to apply a harmless error analysis in cases involving a conditional guilty plea." *Glenn v Commonwealth*, 48 Va App 556, 582; 633 SE2d 205 (Va App, 2006), vacated en banc on other grounds 49 Va App 413; 642 SE2d 282 (Va App, 2007) (collecting cases) (emphasis added).[2]

"[I]nvocation of the harmless error rule is arguably impossible" in cases involving conditional guilty pleas. Official Comment, Fed R Crim P 11(a)(2) (internal quotations omitted)). To apply such an analysis, the government would bear the burden of proving the harmlessness of a constitutional error beyond a reasonable doubt. *Chapman v California*, 386 US 18, 24; 87 SCt 824; 17 LEd2d 705 (1967). But the government will very rarely meet this burden in a case where there has been no trial and no evidence presented. *United States v Benard*, 680 F3d 1206, 1213 (CA 10, 2012).

New York's highest court refused to apply traditional harmlessness review to errors preserved via conditional plea in *People v Grant*, 45 NY2d 366; 408 NYS2d 429; 380 NE2d 257 (NY, 1978). It began with the premise that, "[w]ithout a trial there will be little if any evidence in the record, apart from the proof which should have been excluded." *Id.* at 378. It therefore concluded that the test "must at least be reformulated to determine whether there is a reasonable possibility that the error contributed to the plea." *Id.* at 379. But even this is difficult to assess from a scant plea record. *Id.* at 379. The *Grant* court therefore held that plea withdrawal is required when a defendant prevails on an issue preserved by conditional plea (except in the rare case where the record shows that the issue did not affect the defendant's decision to enter the plea). *Id.* at 379-380.

---

[2] See, e.g., *United States v Benard*, 680 F3d 1206, 1213 (CA 10, 2012) (discussing why conditional pleas are not amenable to harmless error analysis); *United States v Weber*, 668 F2d 552 (CA 1, 1981) (requiring plea withdrawal even though improper evidence "might possibly have been found merely cumulative and non-prejudicial" if the case had gone to trial); *People v Grant*, 45 NY2d 366; 408 NYS2d 429; 380 NE2d 257 (NY, 1978) (refusing to adopt a harmless error test); *Jones v Wisconsin*, 562 F2d 440 (CA 7, 1977) (same); *State v Dinsmore*, 182 Or App 505; 49 P3d 830 (Or App 2002) (same); *State v Monahan*, 76 Wis2d 387; 251 NW2d 421 (Wis, 1977) (same); *People v Hill*, 12 Cal 3d 731; 117 Cal Rptr 393; 528 P2d 1 (1974) (same).

The California Supreme Court arrived at a similar conclusion in *People v Hill*, 12 Cal 3d 731; 117 Cal Rptr 393; 528 P2d 1 (1974), overruled on other grounds by *People v DeVaughn*, 18 Cal 3d 889; 135 Cal Rptr 786; 558 P2d 872 (1977). The defendants in that case pled guilty after the trial court refused to suppress several pieces of evidence against them. *Hill*, 12 Cal 3d at 738-739. Although the California Supreme Court affirmed with respect to the "bulk of the evidence which defendants sought to suppress[,]" it did find that the trial court should have suppressed a few items. *Id.* at 767. The question then became whether the defendants were entitled to plea withdrawal.

Like its counterpart in New York, the California Supreme Court concluded that harmless error review was "clearly inappropriate" in the context of a guilty plea. *Id.* at 768. Instead, it held that the focus should be on how the erroneous suppression ruling impacted the defendants' decisions to plead guilty. The *Hill* court reasoned that only the defendant is in a position to evaluate "the impact of a particular erroneous refusal to suppress evidence." *Id.* at 768. And only the defendant can determine his ability to impeach, discredit or otherwise defend against the evidence available to the prosecution. *Id.* The *Hill* court therefore concluded that the appropriate remedy would be to allow the defendants to affirm or withdraw their pleas after reevaluating their plea bargain in light of its ruling. *Id.* at 769-770.[3] See also *People v Miller*, 33 Cal 3d 545, 553; 189 Cal Rptr 519; 658 P2d 1320 (Cal, 1983) (noting that this procedure accounts for the reality that "[t]he bargaining positions of the parties were determined, in part, by the aggregate strength of all the incriminating evidence accumulated by the state").

[3] The U.S. Supreme Court applies a similar emphasis upon the defendant's decision-making process when evaluating the prejudice from counsel's ineffective plea advice. *Lee v United States*, __ US __; __ S Ct __; __ L Ed 2d __ (June 23, 2017)(Docket No. 16-327), slip op at *7 ("Rather than asking how a hypothetical trial would have played out absent the error, the Court considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial"), citing *Hill v Lockhart*, 474 US 52, 60; 106 S Ct 366; 88 L Ed 2d 203 (1985).

Several jurisdictions have even held that plea withdrawal is required even when the defendant only partially prevails on appeal. *Glenn*, 48 Va App at 578-579. The intermediate appellate courts of New Mexico and Virginia have adopted this remedy "'so that Defendant may have the opportunity to reassess the admissible evidence in this case and either plead guilty or proceed to trial.'" *Id.* at 580, quoting *State v Juarez*, 120 NM 499, 507; 903 P2d 241 (NM App, 1995). Similarly, the Connecticut Supreme Court concluded that plea withdrawal allows "'both the state and the defendant . . . to reevaluate their respective positions in light of the availability of some, but not all, of the evidence gathered as a result of the search. *Id.* at 579-580, quoting *State v Piorkowski*, 236 Conn 388, 931 n15; 672 A2d 921 (Conn, 1996).

Thus, the overwhelming weight of authority from other jurisdictions rejects the notion that conditional pleas are amenable to harmless error analysis. This is consistent with the plain language of MCR 6.302(C)(2), which contains no exceptions to its rule that a conditional plea "entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal." This Court should therefore make clear that success on appeal—in whole or in part—entitles the defendant to an opportunity to affirm or withdraw his or her conditional plea.

III. When a reviewing court concludes that a conditional plea should not have been accepted, then that plea is void at its inception and must be vacated. The defendant must then have the option of either entering an unqualified plea or proceeding to trial.

The court below, in dicta, intimated that it would deny relief "even assuming the search was unconstitutional[.]" *People v Horacek*, unpublished opinion per curiam of the Court of Appeals entered September 15, 2015 (Docket No. 317527), p. 4.[4] It determined that "defendant's plea was not conditional" because "defendant could still be prosecuted even without the admission of his

[4] MCR 7.214(C)(1) provides that "[u]npublished opinions should not be cited for propositions of law[.]" Amicus cites the unpublished opinion issued below not as legal precedent, but rather as a reference to the procedural history of the instant case.

statement." *Id.* In other words, because the plea did not meet *Reid*'s "prosecutability" prerequisite, reviewing courts could treat it as an unqualified guilty plea that waived all non-jurisdictional issues.

There are obvious problems with this approach. First, as Mr. Horacek notes in his supplemental application, constitutional issues arise when a defendant enters what he or she believes to be a conditional plea, only to discover on appeal that it was unconditional. (Deft. Supp. Br. 14-18). Such a scenario implicates the defendant's ability to knowingly and voluntarily waive his or her jury-trial rights. See, e.g., *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

Moreover, the ruling below runs afoul of this Court's decision in *People v McFadden*, 433 Mich 868; 445 NW2d 440 (1989) ("*McFadden II*"), rev'g 170 Mich App 640; 428 NW2d 729 (1988) ("*McFadden I*"). In that case, the defendant asked the trial court to accept his guilty plea while also allowing him to preserve the suppression issue he had raised. *McFadden I*, 170 Mich App at 641-642. The trial court agreed that the issue would be preserved for appeal. *Id.* at 642. But the prosecutor did not respond to the defendant's request; nor did the judge seek the prosecutor's consent. *Id.*

In the Court of Appeals, two of the three judges on the panel voted to affirm the defendant's conviction without reaching his suppression issue. *Id.* The majority concluded that because the prosecutor did not consent, no valid conditional plea entered. *Id.* The dissenting judge, on the other hand, blasted the prosecutor's failure to object. *Id.* (Kelly, J., dissenting). "The prosecutor cannot by his silence lull the defense attorney and his client into relying on the express order of the trial court whether its ruling is supported by appellate precedent or not." *McFadden I*, 170 Mich App at 642. (Kelly, J., dissenting). In such a situation, the defendant must be given the chance for a knowing choice between entering an unqualified plea or going to trial. *Id.*

This Court agreed with the dissenting judge and peremptorily vacated the majority's judgment, explaining:

> We so order because we agree with Judge Kelly's dissent in the Court of Appeals that the record is clear in this case that the agreement concerning the preservation of the issue in question was made in the presence of the assistant prosecuting attorney. While the assistant prosecuting attorney did not object to this agreement nor consent to it, under the circumstances of this case we believe the appropriate remedy is to place the defendant in the position he enjoyed prior to making the agreement in question. [*McFadden II*, 433 Mich at 868].

After *McFadden II*, a plea may be treated as unconditional only if the prosecution withholds consent to a conditional plea and makes that position clear to the defendant before entry of the plea. Otherwise, if the prosecutor neither consents nor objects, the defendant must be given the chance either to withdraw the plea or to stand on it as an unconditional plea. *Id.*

Many jurisdictions have adopted a similar approach. Certain federal jurisdictions, for example, have held that a conditional guilty plea is void at its inception if the defendant attempts to reserve issues for appeal that are not case-dispositive. See, e.g., *United States v Bundy*, 392 F3d 641, 645 (CA 4, 2004) (collecting cases from the Second, Third, Fifth, and Seventh Circuits). Rather than reach the merits of the non-dispositive issues, those courts simply vacate the judgment and remand so that the defendant may choose between trial or pleading guilty anew. *Id.* at 649-650, citing *United States v Wong Ching Hing*, 867 F2d 754, 758 (CA 2, 1989).

Indiana's intermediate appellate court confronted facts similar to those presented in the instant case in *Lineberry v State*, 747 NE2d 1151 (Ind Ct App, 2001). In that case, the defendant pled guilty after the trial judge assured him that he could still appeal the denial of his motion to suppress certain evidence from trial. *Id.* at 1156-57. Only later did he learn that his guilty plea would render any such appeal moot. *Id.* at 1155. The appellate court concluded that the plea was involuntary because "Lineberry's counsel, the prosecutor, and the trial court all played a part in misleading

Lineberry to believe that he could plead guilty and still appeal the denial of the motion to suppress." *Id.* at 1157. It therefore permitted the defendant to withdraw his plea. *Id.* at 1158.

South Carolina, as another example, forbids conditional guilty pleas altogether. *State v Peppers*, 346 SC 502, 504; 552 SE2d 288 (SC, 2001). If "an accused attempts to attach any condition or qualification" to a guilty plea, then "the trial court should direct a plea of not guilty." *State v Truesdale*, 278 SC 368, 370; 296 SE2d 528 (1982). If the trial court accepts a conditional guilty plea, then the plea must be vacated on appeal. *Peppers*, 346 SC at 505.

Indeed, nearly all of the jurisdictions that have found error in the acceptance of a conditional guilty plea have either: (1) reached the merits of the improperly preserved issue, or (2) given the defendant the option of plea withdrawal. See, e.g., *Neuhaus v People*, 289 P3d 19, 24 (Colo, 2012); *People v Cunningham*, 286 Ill App 3d 346, 351; 676 NE2d 998; 222 Ill Dec 34 (Ill App, 1997); *Hooten v State*, 212 Ga App 770, 775; 442 SE2d 836 (Ga App 1994); *State v Soares*, 633 A2d 1356 (RI, 1993); *Commonwealth v Thomas*, 351 Pa Super 423, 431; 506 A2d 420 (Pa Super, 1986); *State v Parkhurst*, 121 NH 821, 823; 435 A2d 522 (NH, 1981); *State v Arnsberg*, 27 Ariz App 205, 207; 553 P2d 238 (Ariz App, 1976); *State v Dorr*, 184 NW2d 673, 674-675 (Iowa, 1971). This Court should adopt the same approach if it concludes that Mr. Horacek did not enter a valid conditional plea.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, CDAM, as amicus curiae, urges this Honorable Court to reverse the judgment below and remand this case to the trial court to give Defendant-Appellant Daniel Horacek the choice between affirming or withdrawing his conditional guilty plea.

Respectfully submitted,

BY: /s/ Christopher M. Smith

CHRISTOPHER M. SMITH (P70189)
Plea Unit Leader
State Appellate Defender Office
200 N. Washington Sq., Suite 250
Lansing, MI 48913
(517) 334-6069

Dated: July 7, 2017